STATE OF MICHIGAN

COURT OF APPEALS

JOHN W. ARMSTEAD,

Plaintiff-Appellant,

v

JAMES DIEDERICH, THOMAS KOCHIS, DR. MALCOLM HENOCH, and OAKWOOD HEALTHCARE, INC., d/b/a OAKWOOD ANNAPOLIS HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
July 21, 2011

No. 296512
Wayne Circuit Court
LC No. 08-121489-NO

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's two grants of summary disposition in favor of defendants and the subsequent dismissal of plaintiff's claims with prejudice. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is an African-American physician who is board certified in obstetrics and gynecology. He had staff privileges at defendant Oakwood hospital for at least 15 years, with reappointments every two years. In approximately 2004, the hospital's chief risk officer notified the chief operating officer, defendant Diederich, of a number of malpractice claims involving plaintiff. The risk officer also informed Diederich of gaps in plaintiff's malpractice insurance coverage. Diederich was concerned about the number of claims against plaintiff and the dollar amounts of those claims. The hospital's claims committee requested that the hospital medical staff review plaintiff's practice with regard to the malpractice claims.

In February 2005, the hospital's chief administrator, defendant Kochis, responded to an inquiry he had received from plaintiff concerning the hospital's inquiries into plaintiff's practice. Kochis explained that the hospital had concerns about both the clinical quality of plaintiff's practice and the potential liability for the hospital. Kochis informed plaintiff that the hospital committee found no clinical quality issues that required corrective action. In March 2005, the hospital's credentials committee recommended that plaintiff's privileges be renewed. However, the hospital's management recommended against renewing plaintiff's privileges. Ultimately, plaintiff's obstetric privileges were terminated.

Plaintiff sought and received a hearing in keeping with the hospital's fair hearing plan, after which the hospital reaffirmed the termination of plaintiff's obstetric privileges. In 2008, plaintiff sued defendants, asserting five counts: tortious interference with a business relationship; violation of public policy; race discrimination in violation of the Elliot-Larsen Civil Rights Act (MCL 37.2101 *et seq*.); negligence; and breach of contract. After multiple discovery disputes, the trial court found defendants immune from liability for damages under the federal Health Care Quality Improvement Act (HCQIA), 42 USC 11111(a)(1). The court granted summary disposition in favor of defendants on all claims except the race discrimination claim. The trial court also found that plaintiff's claims against defendants Kochis and Henoch were time-barred. The court subsequently granted summary disposition on the remaining claims.

II. DISCOVERY OF PEER REVIEW DOCUMENTS

Plaintiff contends that the trial court erred by denying plaintiff's motion to compel production of hospital committee records and by ordering that peer review documents attached to plaintiff's motions be removed from the court files. We review the trial court's discovery orders for abuse of discretion. *Holman v Rasak*, 486 Mich 429, 436; 785 NW2d 93 (2010).

We find no abuse of discretion in the discovery orders. The Michigan Public Health Code requires hospitals to have procedures to review physicians' professional practices, including reviews of "the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital." MCL 333.21513(d). Three statutes render the review process confidential and not subject to discovery in litigation. The first, MCL 331.533, states, "[e]xcept [for certain purposes stated in MCL 331.532], the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding." The second statute states: "[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency . . . are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena." MCL 333.20175(8). Similarly, the third states "[th]e records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena." MCL 333.21515.

Our Courts have interpreted and enforced the statutory confidentiality provisions. In *Feyz v Mercy Mem Hosp*, 475 Mich 663, 685; 719 NW2d 1 (2006), our Supreme Court explained, "the peer review statutory regime protects peer review from intrusive general public scrutiny. All the peer review communications are protected from discovery and use in any form of legal proceedings." Recently, in *Johnson* v *Detroit Med Ctr*, ___ Mich App ___; ___ NW2d ___ (No. 293304, December 21, 2010, slip op p 3), this Court held that a hospital's records relating to a physician's staff privileges are confidential and are not subject to discovery.

Citing *Feyz*, plaintiff argues that a hospital is not a protected entity, and that as such defendant hospital's records are discoverable. Plaintiff further argues that a hospital administrative committee is not entitled to the protections of the peer review statutes. Plaintiff's argument conflates the immunity protections addressed in *Feyz* with the discovery protections at

issue in this case. The issue in *Feyz* was whether the defendants were immune from liability, not whether documents and information was subject to discovery. 475 Mich 674, 680. Our Supreme Court expressly distinguished immunity and discovery, stating that the statutory structure provided two measures of protection: (1) the immunity provisions in MCL 331.531, and (2) the three statutory confidentiality provisions we have quoted *supra*. *Id*. at 680-681. Other than emphasizing the breadth of the confidentiality provisions, the Court did not address discovery matters. Rather, the Court held that a hospital is not immune from liability for decisions relating to staffing privileges. 475 Mich at 689-690. Nothing in *Feyz* altered the existing law that peer review records are statutorily protected from discovery. These controlling statutes and court rules authorized the trial court to issue the relevant discovery orders.

III. IMMUNITY UNDER THE FEDERAL HCQIA

Except for civil rights violations, the HCQIA provides immunity from liability for damages for peer review actions, if the actions are taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). [42 USC 11112(a).]

In addition, the HCQIA provides a burden-shifting provision that alters the summary disposition standard. The HCQIA mandates that "[a] professional review action shall be presumed to have met the preceding standards necessary for the protection . . . of this title unless the presumption is rebutted by a preponderance of the evidence." 42 USC 11112(a). In this case, the presumption shifted the burden to plaintiff to submit specific facts to demonstrate that defendants did not reasonably believe their actions furthered quality health care, that they failed to make reasonable efforts to obtain the facts, that they failed to provide fair procedures, or that they did not reasonably believe the nonrenewal of plaintiff's privileges was warranted by the facts.

Plaintiff's factual allegations depended in large part upon inferences. Plaintiff maintains that defendants failed to meet any of the four conditions of 42 USC 11112(a), and asserts, "[d]efendants come no where [sic] close to establishing a rational basis for their adverse action." This assertion misconstrues defendants' burden and the elements of proof for immunity. Nothing in the HCQIA requires defendants to "establish a rational basis for their adverse action." Rather, defendants are entitled to a presumption that they took the action in the reasonable belief that the action "was in the furtherance of quality health care" and "was warranted by the facts." 42 USC 11112(a).

The record contains no facts to demonstrate, by a preponderance of the evidence, that defendants' actions were unreasonable or unwarranted. Plaintiff contends that the malpractice suits were the results of the hospital's negligence, but he fails to provide specific facts to support his contention. Moreover, plaintiff acknowledged that he lacked insurance coverage for at least two of the claims. The record demonstrates that defendants obtained facts concerning malpractice claims and relied in part upon those facts in making the decision not to renew plaintiff's staff privileges. The record further demonstrates that defendants gave plaintiff proper notice of his opportunity for a hearing and that the hearing was continued upon the request of plaintiff's former counsel. When the hearing was held, plaintiff was represented by counsel who called and cross-examined witnesses. The record thus supports the trial court's conclusion that defendants met the four statutory conditions rendering them immune from liability under the HCQIA.

IV. TIMELINESS OF CLAIMS AGAINST DEFENDANTS KOCHIS AND HENOCH

The trial court concluded that the three-year limitations period of MCL 600.5805(10) controlled plaintiff's remaining claims, and that the claims were time-barred. We agree. Kochis notified plaintiff of the decision not to renew his privileges on May 20, 2005. Neither Kochis nor Henoch were involved in the subsequent peer reviews of plaintiff's privileges. Plaintiff's claims against Kochis and Henoch thus accrued on May 20, 2005. According to MCL 600.5805, the three-year limitations period expired on May 20, 2008. Plaintiff filed his claims on August 22, 2008; accordingly, his claims are time-barred.

V. SUMMARY DISPOSITION OF THE REMAINING RACE DISCRIMINATION CLAIMS

To avoid summary disposition on his claim, plaintiff was required to present some evidence that defendants discriminated against him based upon his race, and that defendants treated similarly situated physicians more favorably than they treated plaintiff. See *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007); see also *Christian v Wal-Mart Stores, Inc*, 252 F3d 862, 872 (CA 6, 2001). In deposition, plaintiff conceded that he had no evidence that he was treated differently than similarly situated physicians. Plaintiff provided no other circumstantial or direct evidence to support his race discrimination claim. Accordingly, the trial court properly granted summary disposition on the claim.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto